IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

February Term, 1923

No. 3866

HARRY MABRY,

Appellant

v.

GEORGE D. BEAUMONT,

As United States Marshal, for the Territory of Alaska, First Division,

Appellee.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLEE

A. G. SHOUP,
United States Attorney.

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STATEMENT OF THE CASE

The above entitled action was brought by Harry Mabry, appellant, upon habeas corpus proceedings in the District Court for the First Division, District of Alaska, on March 25th, 1922, resulting in an order of said District Court discharging the Writ of Habeas Corpus and remanding appellant into the custody of appellee, George D. Beaumont, United States Marshal, whereupon appeal was taken by appellant to this Court.

The facts are: Appellant, Harry Mabry, was convicted before a jury in the United States Commissioner's, ex-officio Justice of the Peace, Court, at Sitka, Alaska, on January 9, 1922, of the crime of possessing intoxicating liquor, to-wit, moonshine whisky, contrary to, and in violation of, the provisions of the Alaska Bone Dry Act. There was nothing whatever, or at all, at the trial or in the record of the case, to warrant the statement in the opening paragraph of appellant's brief that the appellant was accused of a violation of said Act "by taking a drink of 'moonshine whisky' with some friends." Appellant was accused and convicted of having in his possession intoxicating liquor, to-wit, moon-

shine whisky, in violation of said Act; and the facts developed at the trial were that said appellant had in his possession, unlawfully, about two quarts of moonshine whisky which appellant furnished to other persons for intoxicating beverage purposes. So the attempt to belittle appellant's violation of the Act by stating that appellant took a drink of moonshine whisky with some friends is a gross misstatement and not supported by either theory or fact.

Appellant was subsequently sentenced to serve four months in jail and to pay a fine of $600.00, and to pay the costs of the action. On January 11, 1922, appellant, by his attorneys Wickersham and Kehoe, served his Notice of Appeal from said judgment on the United States Attorney; on January 14, 1922, he executed and filed with the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, his Bail Bond, approved by said United States Commissioner in the sum of $1200.00, and was discharged from custody by an order of the said United States Commissioner at Sitka. Thereafter, to-wit, January 18, 1922, as appellant, the said Harry Mabry filed in the District Court for the District of Alaska, Division Number One, at Juneau, his Notice of Appeal from the said judgment of the Commissioner's Court at Sitka. He wholly failed to furnish, within 30 days allowed by statute, his Undertaking for Appeal costs as required by sections 2551 and

2552 of the Compiled Laws of Alaska. On March 16, 1922, because of such failure, on motion of the United States Attorney, the District Court dismissed said pretended appeal and affirmed the judgment of said United States Commissioner's Court for Sitka Precinct, according to the provisions of section 2559, and chapter 53, of said Compiled Laws of Alaska. Thereafter, to-wit, on March 24, 1922, defendant was imprisoned in pursuance of said District Court's judgment. On March 25, 1922, appellant petitioned said District Court for his release from said imprisonment by Habeas Corpus proceedings, and on April 3, 1922, the District Court dismissed the Writ and remanded appellant to the custody of the above named appellee George D. Beaumont, United States Marshal. Thereafter, on April 5, 1922, appellant filed in the District Court his Bail Bond in the sum of $2000.00 and at all times since said last mentioned date has been enlarged upon said bond. His appeal from the order dismissing the Writ and remanding him into custody was allowed April 5, 1922.

ARGUMENT

(a) There are four distinct reasons why Habeas Corpus should not lie in this case:

1. Appellant could have appealed to the District Court from the Justice 's proceedings and judgment.

2. Appellant could have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal.

3. Appellant is not illegally restrained—he has been released on bail pending appeal from an order remanding him in habeas corpus proceedings.

4. The said appellant was not entitled to prosecute the Writ, according to chapter 57 Compiled Laws of Alaska.

(b) If it can be held that Habeas Corpus was proper in this case appellant was not entitled to relief on the merits of the case.

1. Appellant could have appealed to the District Court from the Justice's proceedings and judgment.

Instead of perfecting his appeal according to law and thereby obtaining his trial *de novo* in the District Court, this appellant, after his pretended appeal was dismissed in the District Court, brought Habeas Corpus proceedings and raised numerous objections to the proceedings and judgment in the Commissioner's (Justice's) Court. Every question that he has raised here by Habeas Corpus could have been settled had he made a valid appeal from the Justice's judgment.

It is elementary law that a writ of habeas cor-

pus is not designed to fulfill the functions of an appeal, review, or writ of error, from a judgment or order made by a judge or court acting within his or its jurisdiction.

21 Cyc 285, 29 CJ 25, section 19;
21 Cyc 294;
12 RCL 1185, section 8;
12 RCL 1192, section 15;
In re McKenzie, 180 U. S. 536, at page 546;
Savin petitioner, 131 U. S. 267, at page 279-280;
Ex parte Yarbrough, 110 U. S. 653;
Bailey on Habeas Corpus, par. 30;
In re Habeas Corpus of Burkell, 2 Alaska 108.

The authors of *Habeas Corpus,* 29 CJ 17, section 9, say:

"As in the case of other extraordinary prerogative writs, the writ of habeas corpus will not ordinarily be granted where there is another adequate remedy by appeal or writ of error or otherwise."

And further in 29 CJ 19, section 11:

"Ordinarily the writ of habeas corpus will not be granted when there is an adequate remedy by writ of error or appeal * * * the obstruction of the right of appeal, or the total absence of a remedy by appeal or writ of error, is not of itself any ground for granting relief by

means of a writ of habeas corpus. Habeas corpus cannot be employed as a substitute for writ of error, appeal, certiorari, or similar proceedings."

And further in 29 CJ 25, section 19:

(Habeas corpus) "is not available as a substitute for an appeal or writ or error or other revisory remedy for the correction of errors either of law or fact, at least not in the absence of extraordinary circumstances."

And, according to the authority of the Court of Criminal Appeals of Texas in Ex parte English (Tex. Cr.) 53 S. W. 106, dismissal of appeal does not change the rule. This court said:

"We have repeatedly held that the writ of habeas corpus cannot be used as a writ of appeal, writ of error, or certiorari, nor has it the force or effect of such proceedings. It does not reach such errors or irregularities as would render a judgment voidable merely, but only such irregularities as renders it absolutely void. Appellants had their day in court in this case. Their right of appeal was ample. They failed to comply with the law in reference to appeal bonds, and they were not authorized, after their case had been dismissed by the County Court, to appeal to this court through the writ of habeas corpus." Judgment affirmed. Citing authorities.

The case of *Arnold v. Schmidt,* 155 Wis 55, 143 N. W. 1055, holds:

"The appeal was improperly dismissed; but that error is not available in this (habeas corpus) proceeding."

The case of *U. S. v. Wolters,* 268 Fed. 69, holds that improper denial of appeal is not ground for habeas corpus. 29 CJ 33, note 39 (32). This court said:

"That would be a mere irregularity; if he was entitled to appeal, that right could be enforced by mandamus or some other proper remedy."

According to the foregoing authorities, it would appear that appeal from the Justice's proceedings and judgment was the proper remedy, and not habeas corpus.

Now this appellant, after the expiration of the 30 days allowed by law in which to perfect appeal from a Justice Court to a District Court in criminal cases, (section 2551 Compiled Laws of Alaska) attempted to prosecute his appeal in the District Court. But there is nothing in the record to show that he did not abandon his Notice of Appeal and his pretended appeal; because for more than 30 days from the date of entry of judgment by the Justice at Sitka he did nothing toward perfecting his said appeal, except to serve and file his Notice of Appeal. But supposing that he did in fact intend to appeal to the District Court from said judgment of conviction, then he did in fact select the proper remedy. It

was only when said pretended appeal failed that he brought habeas corpus proceedings, and thereby sought to do by habeas corpus what he failed to do by appeal, that is to say, he attacked all the proceedings had in the Justice's court raising both questions of law and of fact. If this could be done, then a defendant in a criminal action in the Commissioner's (Justice's) Courts of Alaska, instead of prosecuting his appeal in the proper District Court, according to law, could proceed either before or after his right of appeal had expired and have questions of law and fact, which ought to be settled by appeal, settled in habeas corpus proceedings. This, we maintain, upon the authority of the foregoing decisions, he could not lawfully do. His remedy was appeal. Dismissal or failure of the appeal does not change the rule. *Ex parte Schwartz,* 2 Tex. A. 74; *Ex parte English* (Tex. Cr.) 53 S. W. 106.

2. Appellant could have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal.

The appellant in this case was tried by a jury and convicted before the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, of a misdemeanor, to-wit, having intoxicating liquor in his possession in violation of the Alaska Bone Dry Act. Section 1 of the Alaska Bone Dry Act denounces the possession of in-

toxing liquor as a misdemeanor, and by section 366 and section 2519 of the Compiled Laws of Alaska, and by section 28 of the Alaska Bone Dry Act, within the jurisdiction of the United States Commissioner, at Sitka, sitting in his capacity of ex-officio Justice of the Peace. And said Commissioner had jurisdiction over appellant's person. Appellant was duly brought before the Commissioner on a valid warrant (erroneously called "Bench Warrant," page 16 Transcript). He submitted to the jurisdiction of the court without any objection whatever, or at all. He demanded and had a jury trial, and had the aid of a member of the bar for counsel. He was found guilty by the jury and gave notice of appeal. He furnished a bail bond in the sum of $1200.00 and secured his release from custody after conviction and pending appeal. However, he did nothing further toward perfecting his appeal. He did not comply with the statute providing for appeals in criminal actions from justice's courts in this: he wholly neglected and failed to furnish the Undertaking on Appeal required by sections 2550 and 2551 of the Compiled Laws of Alaska. For which reason, upon motion of the United States Attorney, the District Court dismissed said appeal and rendered judgment as provided by section 2559 Compiled Laws of Alaska. (Page 38 Transcript.)

Now the appellant in said order dismissing his

said pretended appeal reserved his exception to the order which was by the court allowed. (Page 39 Transcript.) But he did nothing toward appealing from that final order of dismissal to the Circuit Court of Appeals. Appellant could have appealed from that final order of dismissal rendered by the District Court. *Cartier v. U. S.* (CCA) 248 Fed. 804. Instead of appealing from that final order he brought habeas corpus proceedings and attacked the said final order of the District Court and the proceedings and judgment rendered in the Justice Court. If this final order dismissing the appeal and affirming the Justice's judgment was for any reason contrary to law or invalid appelant could have secured relief by Writ of Error or Appeal. As we have heretofore seen, habeas corpus is not designed or intended to take the place of Appeal or Error. This appeal should now be dismissed in this Court. Appellant should have prosecuted his Writ of Error or Appeal from said final order and judgment of dismissal. Section 2311 Compiled Laws of Alaska.

(3) Appellant's appeal in this case should now be dismissed in this Court for the reason that he is not now illegally restrained. He has been released on bail pending appeal from an order remanding him in habeas corpus proceedings.

The appellant herein, Harry Mabry, on April

5, 1922, furnished his Bond on Appeal (page 105 Transcript) in the sum of $2000.00 and was on the same day released from custody. In his bail (supersedeas) bond (page 105 Transcript) he recites:

"* * * whereas, the above bounden Harry Mabry, has appealed to the Circuit Court of Appeals for the Ninth Circuit from judgment rendered against him in the District Court for Division Number One, at Juneau, District of Alaska, on the 3d day of April, 1922, in that certain cause in which Harry Mabry is plaintiff and the said George D. Beaumont, United States Marshal, is defendant, discharging the writ of habeas corpus therein and remanding the above appellant, plaintiff below, to the custody of him, the said defendant, and whereas the above named appellant has been ordered enlarged upon recognizance in the sum of $2000.00 * * *"

And he was released by order of the District Court on April 5th, 1922, (page 107 Transcript) and discharged from custody. It is clearly in the record and it is a fact that appellant has not at any time since April 5, 1922, been in the custody of, or restrained by, appellee, United States Marshal. The appeal should be dismissed in habeas corpus proceedings when during the pendency of said appeal the person restrained is released on bail.

The authors of *Habeas Corpus,* 29 CJ 191-192, section 222 say:

"Except in a few jurisdictions (citing *Costello v. Palmer,* 20 App. [D. C.] 210) the proceedings to review will be dismissed when, during their pendency, the relator was released on bail."

Johnson v. Hoy, 227 U. S. 245, 33 Sup. Ct. 240, 57 L. Ed. 497;
Cook v. Lowry, 148 Ga. 516, 97 S. E. 440;
Carter v. Gabrels, 136 Ga. 177, 71 S. E. 3;
Ex parte Hengy, 77 Tex. Cr. 621, 179 S. W. 716;
Ex parte Harvey, 77 Tex. Cr. 299, 177 S. W. 1174;
Ex parte Richie, 77 Tex. Cr. 71, 177 S. W. 85;
Ex parte Crumpton, 74 Tex. Cr. 204, 167 S. W. 844;
Ex parte Simpkins, 72 Tex. Cr. 90, 161 S. W. 97;
Ex parte Parvin, 63 Tex. Cr. 512, 140 S. W. 439;
Ex parte Elmore, (Tex. Cr.) 88 S. W. 347;
Ex parte Walton, 45 Tex. Cr. 74, 74 S. W. 314;
Ex parte Talbutt, 39 Tex. Cr. 12, 44 S. W. 832;
Ex parte Branch, 36 Tex. Cr. 384, 37 S. W. 421;
Ex parte Erwin, 7 Tex. A. 288;
Ex parte Peyton, 2 Tex. A. 295;
Wales v. Whitney, 114 U. S. 564;
Contra: *Mackenvie v. Barrett,* 141 Fed.

964, 73 CCA 280, 5 Ann. Cas. 551.

The law does not require a vain thing to be done. It has been repeatedly held in Texas that though an applicant for a writ of habeas corpus is in jail at the time the application is made and heard, if an appeal is entered the suit will be abated by the applicant's giving bond thereby releasing him from actual custody pending the appeal.

Tyler v. State, 133 S. W. 1046, 61 Tex. Cr. R. 66;

Ex parte Stephenson, 140 S. W. 94, 63 Tex. Cr. R. 274;

Ex parte Eldridge, 162 S. W. 1149, 72 Tex. Cr. R. 529.

The Court of Criminal Appeals has no jurisdiction of an appeal from the judgment in a habeas corpus proceeding remanding the petitioner, where he is admitted to bail pending the appeal.

Ex parte Harvey, 177 S. W. 1174, 77 Tex. Cr. R. 299;

Ex parte Hengy, 179 S. W. 716, 77 Tex. Cr. R. 621.

Where a party sues out a habeas corpus, and is remanded and allowed to enter into a recognizance on appeal, the Court of Criminal Appeals has no jurisdiction, and the appeal will be dismissed.

Ex parte Parvin, 140 S. W. 439, 43 Tex. Cr. R. 512;

Ex parte Crumpton, 167 S. W. 844, 74 Tex. Cr. R. 204.

Where accused, remanded to the custody of the sheriff to be released on bond, appealed, his appeal should be dismissed for want of jurisdiction if he afterwards entered into bond.

Ex parte Simpkins, 161 S. W. 97, 72 Tex. Cr. R. 90.

Contrary to the foregoing holdings is the case of *Costello v. Palmer,* 20 App. Cas. (D. C.) 210, wherein the court holds that a person on bail is in the custody of the law and is restrained of his liberty and therefore release on bail pending appeal from final order in habeas corpus proceedings is not ground for dismissal.

The only other decision we have been able to find against this proposition is *Mackenzie v. Barrett,* 141 Fed. 964, 73 CCA 280, 5 Ann. Cas. 551, and note, wherein it is held that habeas corpus proceedings are not abated by the release of the petitioner on bail pending his appeal from an order denying the writ. In the *Mackenzie* case, however, the decision is questioned in the case of *Sebray v. U. S.* 185 Fed. 401, wherein the court says at page 404:

"In the case of *Baker v. Grice,* 169 U. S. 284, 18 Sup. Ct. 323, 42 L. Ed. 748, the Supreme Court

reversed Judge Swayne, whose opinion is referred to by the Circuit Court of Appeals in *MacKenzie v. Barrett, supra.*"

In the case of *Johnson v. Hoy,* United States Marshal for the Northern District of Illinois, 227 U. S. 245, the United States Supreme Court at page 247 says:

"The orderly course of a trial must be pursued and the usual remedies exhausted, even where the petitioner attacks on habeas corpus, the constitutionality of the statute under which he was indicted, was decided in *Glasgow v. Moyer,* 225 U. S. 420. That and other similar decisions have so definitely established the general principle as to leave no room for further discussion * * * citing *Riggins v. U. S.,* 199 U. S. 547 * * * But even if it could be claimed that the facts relied on presented any reason for allowing him a hearing on the constitutionality of the act at this time, the defendant would not be entitled to the benefit of the writ, because since the appeal he has given bond in the District Court and has been released from arrest under the warrant issued on the indictment. He is no longer in the custody of the marshal to whom the writ is addressed, and from whose custody he seeks to be discharged. The defendant is now at liberty, and having secured the very relief which the writ of habeas corpus was intended to afford to those held under warrants

issued on indictments, the appeal must be dismissed." Approved and followed in the case of *Craig v. Jarrett,* Sheriff, 234 U. S. 752; and in the case of *Daeche v. Bollschweiler,* U. S. Marshal, etc., 241 U. S. 641.

Counsel for appellee maintain that this appeal should now be dismissed because appellee has not appellant's person in custody, illegally or otherwise. Appellant has been released on bail pending his appeal from the order of the District Court dismissing the writ and remanding him into the custody of appellee.

(4) APPELLANT WAS NOT ENTITLED TO PROSECUTE HABEAS CORPUS, according to chapter 57, Compiled Laws of Alaska, relating to the Writ of Habeas Corpus.

Appellee maintains that chapter 57, Compiled Laws of Alaska, relating to the Writ of Habeas Corpus, denies to appellant the right to prosecute the writ of habeas corpus, and that the District Court properly dismissed the Writ and remanded this appellant. Section 1399 of chapter 57 provides:

"Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, SHALL NOT BE ALLOWED TO PROSECUTE THE WRIT."

Section 1410 provides:

"The court or judge before whom the party shall be brought on such writ shall, immediately after the return thereof, proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party, whether the same shall have been upon commitment for any criminal or supposed criminal matter or not."

Section 1412 provides:

"It shall be the duty of the court or judge forthwith to remand such party if it shall appear that he is legally detained in custody."

Section 1414 provides:

"But no court or judge, on the return of a writ of habeas corpus, has power to inquire into the legality or justice of any order, judgment, or process specified in section 1399, nor into the justice, propriety, or legality of any commitment for a contempt made by a court, officer, or body, according to law, and charged in such commitment, as provided by law."

Section 1415 provides:

"If it appear that the party has been legally committed for a criminal offense, or if he appear by the testimony offered with the return, or upon the hearing thereof, to be probably guilty of such offense, although the commitment be irregular, he shall forthwith be remanded to the

custody or placed under the restraint from which he was taken, if the officer or person under whose custody or restraint he was be legally entitled thereto; if not so entitled, he shall be committed to the custody of the officer or person so entitled."

Section 1419 provides:

"The plaintiff in the proceeding, on the return of the writ, may, by replication, verified as in an action, controvert any of the material facts set forth in the return, or he may allege therein any fact to show, either that his imprisonment or restraint is unlawful, or that he is entitled to his discharge; and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint, or against the same, and to dispose of the party as the law and justice of the case may require."

Section 1420 provides:

"The plaintiff may demur to the return, or the defendant may demur to new matter, if any, set forth in the replication of the plaintiff, or by proof controvert the same, as upon a direct denial or avoidance. The pleadings herein provided for shall be made within such time as the court or judge shall direct, and they shall be construed and have the same effect as in an action."

Section 1422 provides:

"If it appear that the party detained is illegally imprisoned or restrained, judgment shall be given that he be forthwith discharged; otherwise judgment shall be given that the proceeding be dismissed and the party remanded."

Now appellee United States Marshal duly made his return (page 43 Transcript) to the Writ of Habeas Corpus, to which said return he attached a copy of the judgment of the Justice's Court. He also attached to said return a copy of the District Court's order dismissing the appeal and confirming the judgment of the Justice's court, From the face of appellee's return to the Writ, so made as aforesaid, it appears that this appellant was then and there held BY VIRTUE OF THE LEGAL JUDGMENT OF A COMPETENT TRIBUNAL OF CRIMINAL JURISDICTION, to-wit, the judgment of the Justice's court for Sitka Precinct, as affirmed by the District Court at Juneau. It appeared that appellant was legally detained in custody. According to section 1399, just cited, persons so imprisoned or restrained are not allowed to prosecute the Writ. Now this return of the Marshal to the Writ was not conclusive upon appellant. Under section 1419, Compiled Laws of Alaska, he could have, if he still desired to show that such imprisonment or restraint was unlawful, or that appellant was entitled to his discharge, controverted any of the

material facts set forth in the return of the writ by replication, verified as in an action. Whereupon, had he so controverted the return, it was the duty of the court "to proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint, or against the same, and to dispose of the party as the law and justice of the case may require." Again, the appellant could have, under section 1420, Compiled Laws of Alaska, demurred to the return, * * * or by proof controverted the same, as upon a direct denial or avoidance. What did appellant do when the return was made in the District Court? Appellant's Bill of Exceptions (page 51 Transcript) shows the only action taken by the appellant. The Bill of Exceptions in this particular is as follows:

"* * * and thereupon the said defendant filed his Return to the Writ of Habeas Corpus issued in this case, which return on being read by the attorney for the said petitioner was excepted to by him for said petitioner and an oral denial was made to so much thereof as alleged that the petitioner voluntarily surrendered himself into the custody of the said marshal and voluntarily yielded to the restraint and imprisonment complained of in the petition herein for the writ, and thereupon the judge of this court asked if petitioner desired to offer any testimony in denial thereof, and whereupon

counsel for the petitioner asked leave of the Court to introduce testimony in denial thereof, and leave of the Court being had called George D. Beaumont and Harry Mabry as witnesses who being first duly sworn gave the following testimony."

The testimony is set out in full at pages 52 to 56 inclusive of the Transcript of Record. Appellee maintains that the evidence so offered, and the record, indicates that appellant voluntarily surrendered himself into custody, and for the purpose of bringing this habeas corpus proceeding. But be that as it may, it clearly appears that the appellant did not object to the validity of the judgment as affirmed by the District Court set forth in the return. Nor did he question the sufficiency of the return or the sufficiency of the judgment under which he was held, copies of which were attached to the return. The only objection he made was as to whether or not appellant voluntarily surrendered himself into custody. In this connection be it remembered that during all this time appellant was enlarged upon his bail bond, in which said bond he had promised and agreed to abide by and perform the orders and judgment of the District Court or forfeit $1200.00.

THE RETURN TO THE WRIT SHOWED A COMMITMENT UNDER JUDICIAL PROCESS AND MUST BE HELD CONCLUSIVE AND THE

JUDGMENTS UNDER WHICH APPELLANT WAS HELD, AS SET FORTH IN THE RETURN, MUST BE HELD VALID AND SUFFICIENT BECAUSE UNCONTROVERTED. There was no issue for the District Court to try except that controverted point, to-wit, whether or not appellant voluntarily surrendered himself into custody. Appellant did not demur, answer, or otherwise controvert the facts set up in appellee's return to the writ, except as just stated. It did "appear on the return that the prisoner was in custody by virtue of an order * * * of a court legally constituted, and issued by an officer in the course of judicial proceedings before him authorized by law." Appellant was not entitled to be discharged under any of the provisions of section 1413, Compiled Laws of Alaska, because it did not appear on the uncontroverted return that:

"First. The jurisdiction of such court or officer had been exceeded, either as to matter, place, sum, or person;

"Second. The original imprisonment was lawful, yet by some act, omission, or event which has taken place afterward the party has become entitled to be discharged;

"Third. The order or process is defective in some matter of substance required by law, rendering such process void;

"Fourth. The order or process, though in proper form, has been issued in a case not allowed by law;

"Fifth. The person having the custody of the prisoner under such order or process is not the person empowered by law to detain him; or,

"Sixth. The order or process is not authorized by any judgment of any court nor by any provision of law."

The court had no alternative but to remand the appellant under the provisions of section 1412, Compiled Laws of Alaska. According to the provisions of section 1399, Compiled Laws of Alaska, appellant should not have been allowed to prosecute the writ.

The authors of *Habeas Corpus,* 29 CJ 164, section 188, on this point say:

"By statute, the law everywhere now is that the return is not conclusive, and the petitioner or person retsrained may not only set up new matter in confession and avoidance, as at common law, but he may deny any of the facts set forth in the return. In the absence of a denial, averments of facts in the return will be taken as true and conclusive, *regardless of the allegations contained in the petition,* and the only question for determination is whether or not the facts stated in the return, as a matter of law, author-

ize the restraint under investigation * * *" and numerous cases cited.

The authors of *Habeas Corpus*, 10 Stand. Encyc. Proc. 933 say:

"When the petitioner desires to deny the allegations of fact in the return he should do so by filing an answer or traverse, and not by the production of a mere affidavit. If no such traverse or answer be filed and the return is sufficient, the prisoner must be remanded. THE FACTS ALLEGED IN THE RETURN ARE TAKEN AS TRUE UNLESS THEY ARE PROPERLY TRAVERSED." And numerous authorities cited.

Congress borrowed the Alaska law of Habeas Corpus from Oregon. The adoption by Congress of a state statute includes the adoption of the construction previously given to it. A statute taken from another state will be presumed to be taken with the meaning it had there. *Stell v. Dessmore,* 3 Alaska, 395. Let us see what construction the Supreme Court of Oregon has given to these statutes.

The Supreme Court of Oregon in the case of *Ex parte Stacey,* 75 Pac. 1061, says:

"The bill of exceptions does not disclose that Stacey interposed a plea of not guilty to the information, but, as the return to a writ of

habeas corpus is traversable in this state, (B. & C. Comp, section 640) (identical with section 1419 Compiled Laws of Alaska) if such plea was not entered it was his duty to show that fact, and not having done so, it will be presumed that the court had jurisdiction of his person. *Ex parte Howe,* 26 Or. 181, 37 Pac. 536."

The Oregon Supreme Court in the case of *In re Howe,* 37 Pac. 536, (1894) in construing the provisions of their statute providing for answer or traverse to a return to writs of habeas corpus, says:

"The only question on this appeal arises on a demurrer to the return of the officer. *Merriman v. Morgan,* 7 Or. 68; *Barton v. Saunders,* 16 Or. 51, 16 Pac. 921. From the return it appears that the petitioner is detained by virtue of five separate commitments from a court of competent jurisdiction, regular and valid on their face; and the presumption is therefore in favor of the legality of such imprisonment, and the burden of impeaching its legality is on the petitioner. Church Hab. Corp. (2d Ed.) section 236. This return was, by virtue of section 628 of the statute, (section 1419 Compiled Laws of Alaska identical) open to denial, or its justification to the sheriff might be controverted by the allegation of any fact showing either that the imprisonment was unlawful, or that the petitioner was entitled to be released. In such

case the statute requires the court to proceed in a summary way to hear such evidence as may be produced in support of or against the imprisonment or restraint and dispose of the case as law and justice may require. Under this provision of the statute the petitioner could have alleged and shown, if the facts warranted, that the several commitments were for the same offense; but, not having done so, this court cannot indulge in any presumptions to that effect. Each of the charges against the petitioner may have been for a separate violation of the statute, and there is nothing in the proceedings to show that they were not. From these conclusions it follows that the judgment of the court below must be affirmed."

In the case of *Lane v. Word,* Sheriff, 130 Pac. 741, decided by the Supreme Court of Oregon in construing statutes identical with those of Alaska, Burnett, J., says:

"At the hearing before this court, the defendant objected, as thus stipulated he might, contending that the validity of the return itself, that document not having been traversed, was the only question for us to determine. Although the circuit court may have considered the judgment roll referred to as a part of the sheriff's return, uncontradicted as it was, the circuit court rendered the proper judgment. The only purpose that could be served by the judgment

roll referred to was to prove some controverted allegation in the return; but as we have seen, no traverse was made on anything alleged in the return, and hence there was no need to use the judgment roll as evidence or for any other purpose.

"Section 639, L. O. L., (identical in phraseology with section 1410 Compiled Laws of Alaska) states that: "The court or judge before whom the party shall be brought on such writ shall immediately after the return thereof proceed to examine into the facts contained in such return and into the cause of the imprisonment or restraint of such party whether the same shall have been upon commitment for any criminal or supposed criminal matter or not."

"Section 648, L. O. L., (identical in phraseology with section 1419 Compiled Laws of Alaska) states that: "The plaintiff in the proceeding on the return of the writ may by replication verified as in an action controvert any of the material facts set forth in the return or he may allege therein any fact to show either that his imprisonment or restraint is unlawful or that he is entitled to his discharge and thereupon the court or judge shall proceed in a summary way to hear such evidence as may be produced in support of the imprisonment or restraint or against the same and to dispose of

the party as the law and justice of the case may require.

"Having before us then an unchallenged return, the only question for us to determine is whether or not it shows sufficient facts to retain the petitioner in custody * * * On account of the state of the pleadings before us, we cannot inquire into the main question argued in the hearing. The judgment of the court below (dismissing writ) is affirmed."

In the case of *Stratton U. S. Immigrant Inspector v. Rudy,* 176 Fed. 727, 101 CCA 223, the court says at page 730:

"The transcript shows no traverse either by pleadings or evidence of facts recited in the return of the immigration officers to the writ of habeas corpus. The return on a writ of habeas corpus reciting facts imports verity until impeached. *Crowley v. Christensen,* 137 U. S. 86, 94, 11 Sup. Ct 13, 34 L. Ed. 620. The return shows a state of facts under which Mrs. Rudy was lawfully held in custody; and, without evidence controverting the said facts, the court erred in releasing her from the custody of the immigration officers. See *Japanese Immigrant case* 189 U. S. 86, and *Chin Yow v. U. S.* 208 U. S. 8. The decree appealed from is reversed, and the cause is remanded with instructions to enter judgment dismissing the writ, and return-

ing Mrs. Rudy to custody of immigration officers."

The return as made by appellee in this case shows on its face legal justification for appellant's detention. It follows that the District Court properly dismissed the writ and remanded this appellant.

(b) BUT EVEN IF ALL THE FOREGOING CONTENTIONS WERE UNSOUND APPELLANT WOULD NOT BE ENTITLED TO RELIEF ON THE MERITS OF THIS CASE.

Going now to the merits of appellant's case made by this habeas corpus proceeding, if it can be held that he is entitled to prosecute such remedy in this case, let us inquire into the record and determine whether his contentions are well taken. We maintain they are not.

It is elementary that where restraint is under legal process habeas corpus is not designed to inquire into mere errors and irregularities which do not render the proceedings void.

The authors of *Habeas Corpus,* 12 Ruling Case Law at page 1192 say:

"Proceedings on habeas corpus to obtain release from custody under final judgment being in the nature of a collateral attack, the writ deals only with such radical defects as render

the proceeding or judgment absolutely void, and cannot have the effect of an appeal, writ of error, or certiorari, for the purpose of reviewing mere error and irregularities in the proceedings leading up to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed, nor are mere defects in the judgment or sentence itself, or irregularities after it is pronounced, reviewable in this manner. If the court has jurisdiction of the person and the subject matter, and could render a judgment upon a showing of any sunfficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. THIS RULE APPLIES TO INFERIOR COURTS, AND THE JUDGMENT OF AN INFERIOR COURT, SUCH AS A POLICE COURT, MAYORS, MAGISTRATES, OR JUSTICES, HAVING JURISDICTION CONFERRED BY LAW TO TRY AND DISPOSE OF A CRIMINAL CASE, IS AS CONCLUSIVE AND RESTS UPON THE SAME BASIS, WHEN THE JURISDICTION HAS ATTACHED, AS THE ADJUDICATION OF ANY OTHER COMMON LAW COURT. This rule that mere errors or irregularities are not ground for habeas corpus has been held to apply though no appeal or writ of error will lie to the judgment." An authorities

cited. Se also note 87 A. S. R. 198 for full discussion as to rule in justice's courts.

The authors of *Habeas Corpus,* 29 CJ 27, section 19, say:

"Where the restraint is under legal process, mere errors and irregularities which do not render the proceedings void are not ground for relief by habeas corpus."

And further at page 29, note 6 (a) and (b):

"This is especially true after the judgment has been affirmed by the supreme court," and "dismissal of appeal does not change the rule."

In the case of *Ex parte Siebold,* 100 U. S. 371, 375, 25 L. Ed. 717, the Supreme Court of the United States laid down the rule:

That "the only ground on which this court, or any court, without some special statute authorizing it, will give release on habeas corpus to a prisoner under conviction and sentence of another court, is the want of jurisdiction in such court over the prisoner or the cause, or some other matter rendering the proceedings void."

And in the case of *In re Coy,* 127 U. S. 731, 757, 8 Sup. Ct. 1263, 1271, 32 L. Ed. 274, Mr. Justice Miller, speaking for the Court said:

"An imprisonment under a judgment cannot

be unlawful unless that judgment is an absolute nullity."

In *Kaizo v. Henry,* High Sheriff of Hawaii, 211 U. S. 146, the United States Supreme Court lays down the following rule:

"No court may properly release a prisoner under conviction and sentence of another court, unless for want of jurisdiction of the court or person, or for some other matter rendering its proceedings void. Where a court has jurisdiction, mere errors which have been committed in the course of the proceedings cannot be corrected upon a writ of habeas corpus, which may not in this manner usurp the functions of a writ of error." Citing:

Ex parte Parks, 93 U. S. 18;
Ex parte Siebold, 100 U. S. 371, 375;
Ex parte Yarbrough, 110 U. S. 651, 653;
Ex parte Wilson, 114 U. S. 417;
In re Delgado, 140 U. S. 586;
U. S. v. Pridgeon, 153 U. S. 48, 59, 63;
Andrews v. Swartz, 156 U. S. 272, 276;
Riggins v. U. S., 199 U. S. 547;
Filts v. Murphy, 201 U. S. 123;
Valentina v. Mercer, 201 U. S. 131.

In the case of *Ex parte Moran,* 144 Fed. 594, Sanborn, Circuit Judge, speaking for the court says at page 604:

"The writ of habeas corpus does not challenge the regularity or legality of the action of a court in the trial or procedure which results in the imprisonment of a petitioner. It may not perform the office of a writ of error or of an appeal. It presents but two questions for consideration: Did the court which rendered the judgment or made the order of imprisonment have jurisdiction of the subject matter and of the person? And did the court in the course of the proceeding which resulted in the judgment exceed its jurisdiction? *Ex parte Parks,* 93 U. S. 18, 23; 23 L. Ed. 787; *Ex parte Siebold,* 100 U. S. 371, 375, 25 L. Ed. 717. See also note to *Ex parte Robinson,* L. R. A. 1918B 1160.

And in denying an application for a writ of habeas corpus by one convicted in the police court of the District of Columbia, the United States Supreme Court in the case of *In re Gregory* (1911) 219 U. S. 212, 55 L. Ed. 188, 31 Sup. Ct. 143, said:

"The only question before us is whether the police court had jurisdiction. A habeas corpus proceeding cannot be made to perform the function of a writ of error and we are not concerned with the question whether the information was sufficient or whether the acts set forth in the agreed statement constitute a crime, that is to say, whether the court properly applied the law, if it be found that court had jurisdiction to try the issues and render the judgment."

Ex parte Kearney, 7 Wheat. 38;
Ex parte Watkins, 3 Pet. 193;
Ex parte Parks, 93 U. S. 18;
Ex parte Yarbrough, 110 U. S. 651;
Gonzales v. Cunningham, 164 U. S. 612;
In re Eckert, 166 U. S. 481;
Storti v. Massachusetts, 183 U. S. 138;
Dimmick v. Tompkins, 194 U. S. 540;
Hyde v. Shine, 199 U. S. 62, 83;
Whitney v. Dick, 202 U. S. 132, 136;
Kaizo v. Henry, 211 U. S. 146, 148.

And further in the case entitled *Matter of Gregory,* 219 U. S., at page 218, the court says in conclusion:

"The question here is not one of guilt or innocence, but simply whether the court below had jurisdiction to try the issues. And as we find that the statute conferred that jurisdiction the application for the writ of habeas corpus must be denied."

Section 1399, Compiled Laws of Alaska, provides that in certain cases the writ shall not be allowed:

"Persons properly imprisoned or restrained by virtue of the legal judgment of a competent tribunal of civil or criminal jurisdiction, or by virtue of an execution regularly and lawfully issued upon such judgment or decree, *shall not be allowed* to prosecute the writ."

Section 1413, Compiled Laws of Alaska, provides in what cases the writ SHALL BE ALLOWED:

"If it appear on the return that the prisoner is in custody by virtue of an order or civil process of any court legally constituted, or issued by an officer in the course of judicial proceedings before him, authorized by law, such prisoner shall be discharged in either of the following cases:

"First. When the jurisdiction of such court or officer has been exceeded, either as to matter, place, sum, or person;

"Second. When, though the original imprisonment was lawful yet by some act, omission, or event which has taken place afterwards the party has become entitled to be discharged;

"Third. When the order or process is defective in some matter of substance required by law, rendering such process void;

"Fourth. When the order or process though in proper form, has been issued in a case not allowed by law;

"Fifth. When the person having the custody of the prisoner under such order or process is not the person empowered by law to detain him, or;

"Sixth. When the order or process is not authorized by any judgment of any court nor by any provision of law."

Now the return made by appellee United States Marshal to appellant's Writ of Habeas Corpus is fully set out at page 43 of the Transcript and shows conclusively, the same not being controverted except as to appellant's voluntarily surrendering himself into custody, that appellant was held by virtue of a judgment of the United States Commissioner, ex-officio Justice of the Peace, at Sitka, Alaska, as affirmed by the District Court at Juneau after appellant's pretended appeal was dismissed. The question now to be determined is that of jurisdiction only, and whether said Commissioner's proceedings and judgment are absolutely void. We are not concerned with mere errors and irregularities in the proceedings and judgment.

It is not disputed that the United States Commissioner's Court, at Sitka, is legally constituted and that such Commissioner acting in his capacity of ex-officio Justice of the Peace has trial jurisdiction of misdemeanors defined by the Alaska Bone Dry Act, (Section 28, Alaska Bone Dry Act) including illegal possession of intoxicating liquors, and has authority to render judgments and sentence offenders for such violations.

Section 28 of the Alaska Bone Dry Act pro-

vides that "in such prosecutions anyone making a false oath to any material fact shall be deemed guilty of perjury." The Act does not provide the penalty for such perjury. Perjury being a felony in Alaska would be prosecuted under indictment returned by a grand jury. All other crimes defined by the Act are misdemeanors and within the trial jurisdiction of United States Commissioner's Courts acting in their capacity of ex-officio Justices of the Peace. Even though no presumption is in favor of the regularity of proceeding in an inferior court the rule is as firmly established that no irregularity will be presumed to exist. Appellant by inferring that this prosecution might have been for the crime of perjury is presuming irregularity because the proceedings in the Justice's court could not by any examination of the record be held to be for perjury, nor for bind over proceedings as in felony cases. The Justice's court has trial jurisdiction over all other crimes denounced by the Act. In this case the court had jurisdiction over the subject matter. Let us see whether or not the court had jurisdiction over appellant's person.

The warrant of arrest, erroneously called "bench warrant" by the appellant, is printed at page 16 in the Transcript of Record. It is substantially in the form prescribed by section 2384 of the Code of Criminal Procedure, ex-

cept that the crime of which the appellant is accused is therein designated as "violating the Alaska Bone Dry Act. Pub. No. 308," and to this defect the appellant now takes exception. The appellant was taken into custody by the marshal on the date of the issuance of the warrant, and as appears from the transcript of record from the Commissioner's Court, (Transcript page 26) on being brought before the Commissioner, entered a plea of not guilty, and demanded a jury trial, and was represented by attorney, and was tried and found guilty. NO OBJECTION WAS MADE TO THE WARRANT OF ARREST OR THE INFORMATION, OR TO ANY PART OF THE PROCEEDINGS OR JUDGMENT. The record further shows that after conviction appellant gave his bail bond on appeal (page 23 Transcript) and was released from custody by order of the Commissioner (page 24 Transcript). He served and filed his Notice of Appeal and attempted to appeal to the District Court from the Justice's judgment, ALL WITHOUT ANY OBJECTION TO THE PROCESS OR PROCEEDINGS. Furthermore, appellant is not now held, nor was he so held when he brought this habeas corpus proceeding, upon the original warrant of arrest. It cannot now be asserted that the Commissioner's court did not have jurisdiction over appellant's person. He waived all defects in this warrant, if any there were, by submitting to the jurisdic-

tion of the court without objection. 16 CJ 310, sections 551 and 552.

But even though the defendant had not waived any of the alleged defects in this warrant of arrest, it is sufficient in this kind of a proceeding. At least it is not void. The authors or *Criminal Law,* 16 CJ 306, section 543, on this point say:

"Except in cases where the warrant serves as an indictment or information, technical accuracy is not required in the description of the offense. The essential point is that accused should be able to understand from the description what charge he has had to meet, and a warrant which fully informs him on this point is generally speaking sufficient. Thus, as a general rule, it is sufficient to describe the offense charged by giving its name; and it is never necessary to set forth the circumstances of the offense or the details of its commission, or the evidence by which it is proposed to support the accusation. THERE IS AUTHORITY TO THE EFFECT THAT IT NEED NOT EVEN CONTAIN A SPECIFICATION OF THE PARTICULAR OFFENSE; but the better opinion, as well as the general and approved practice, is that it should state the offense with convenient certainty; that it should not be for felony generally but should show the special nature of the felony."

See also *Criminal Law,* 16 CJ 306, section 542,

as to sufficiency in the description of the offense.

The case of *State v. Cupton,* 166 N. C. 257, 80 S. E. 989 holds that the affidavit and warrant should be construed together. If that is done in this case it clearly appears that appellant was arrested for having moonshine whisky in his possession in violation of the Alaska Bone Dry Act.

The case of *State v. Potter,* 23 S. C. L. 296, holds that a warrant commanding an officer to arrest one on a charge of felony, without designating the species of felony, is not void. The description of the offense for which appellant was taken into custody under this warrant is even more definite than had it been designated as simply a misdemeanor.

In *Martin v. State,* 32 Ark. 124, 130, the Court said:

"The statute requires the warrant of arrest, in general terms, to name or describe the offense charged to have been committed, and gives a form for such warrant. *Cantt's Digest,* sec. 1669, and notes. But we think a warrant commanding an officer to arrest a person on a charge of felony, without designating the species of felony, would not be void, and that the officer could not legally refuse to arrest the accused, and would be liable to indictment if

he permitted him to escape by negligence."

Even though it should be held that appellant did not waive the alleged defect by his general appearance without objection, this warrant is at most voidable and not void and cannot be ground for habeas corpus, and does not invalidate the proceedings in the Commissioner's court.

THE INFORMATION IS SUFFICIENT. Turning now to the first pleading on the part of the government (page 15 Transcript) we find that it is entitled a complaint. But the name by which such a pleading is called does not in fact determine its character. If it was entitled a judgment that would not make it a judgment in fact. What the pleading is called is immaterial, at least it does not make the pleading void. At most it is an irregularity which cannot be reached by habeas corpus proceedings. Prosecutions for violations of the Alaska Bone Dry Act, according to section 27 shall be by certain named officers, including prosecuting attorneys and their deputies. Section 28 of the Act provides:

"That prosecutions for violations of the provisions of this Act shall be on information filed by any such officer before any justice of the peace or district judge, or upon indictment by any grand jury of the Territory of Alaska, and

said United States District Attorney or his deputy shall file such information upon the presentation to him or his assistants of sworn information that the law has been violated."

It appears (page 15 Transcript) that said so-called complaint was filed by a proper officer, to-wit, an assistant United States Attorney. It is duly verified and discloses on its face that it is entitled in the proper court and charges a crime over which the justice had trial jurisdiction. The mere fact that it is called a complaint is not a jurisdictional defect rendering it void. It is an information in fact. Capter 31 of The Compiled Laws of Alaska, and section 2379, defines an information as follows:

Section 2379. "That an information is the allegation or statement made before a magistrate, and verified by the oath of the party making it, that a person has been guilty of some designated crime."

Section 2380. "That a magistrate is an officer having power to issue a warrant for the arrest of a person charged with the commission of a crime."

The first pleading on the part of the government, called a complaint, substantially conforms to the requirements of the chapter and sections quoted. In the case of *Booth v. U. S.* 197 Fed. 284, an Alaska case taken to this court,

a form of an information is set out in full, and upheld, and the first pleading on the part of the government in this case, substantially conforms to the form of information upheld in the Booth case. By going to trial without objection this appellant waived the irregularity, or error, if it existed, and he cannot now be heard on that point in this kind of a proceeding. The defendant was not prejudiced in the reference to a violation of "The Alaska Bone Dry Act, Pub. No. 308" without more specific reference to the law violated. He made no objection to the defect, if any existed. This court will take judicial notice of the fact that Alaska has a Bone Dry Act. The Abbatte case, (*Abbatte v. U. S.*, 270 Fed. 737) in referring to the Alaska Bone Dry Act and the National Prohibition Act, reads in part as follows:

"In brief, we think, that the Bone Dry Law of Alaska remains in force, just as do the prohibition laws of the States, and the National Prohibition Act, although in force in all jurisdictions, affects no more the Alaskan Act than it does the state acts."

See also *Koppitz v. U. S.* 272 Fed. 96.

Numerous Federal decisions refer to the VOLSTEAD ACT and the NATIONAL PROHIBITION ACT. The ALASKA BONE DRY ACT is the popular name of Alaska's prohibition act. So it is of

common knowledge what is intended when we speak of the ALASKA BONE DRY ACT. Section 1 of the Alaska Bone Dry Act provides that it shall be unlawful to possess intoxicating liquor. This appellant is charged with wilfully and unlawfully having intoxicating liquor, to-wit, moonshine whisky, in his possession in violation of the Alaska Bone Dry Act. Appellant certainly knew what the charge was against him, and certainly he was not prejudiced in this particular, because in his Notice of Appeal (Transcript page 22) he recites:

"* * * defendant * * * appeals * * * from the judgment * * * wherein the said defendant was convicted of a violation of the ALASKA BONE DRY LAW, to-wit, the possession of intoxicating liquor in violation of the said law * * *"

His description of the Act under which he was convicted, and his description of the crime of which he was convicted, is no more definite or exact than is charged in the information and warrant in this case, if as definite, because the information describes the intoxicating liquor as moonshine whisky, the possession of which could not under any circumstances be lawful. And certainly it demonstrates clearly that said appellant was not prejudiced in respect to his knowledge as to the nature of the crime charged against him, and for the commission of which

he was convicted. This appellant is rather inconsistent now, even to the point of estoppel, in raising this point in this kind of a proceeding.

This information would still be valid even though the reference to "Alaska Bone Dry Act Pub. No. 308" was omitted entirely. Under the authority of the Vedin case (*Vedin v. U. S.* 257 Fed. 550) from Alaska, decided by this court:

"The statute on which an indictment is found is determined as a matter of law, from the facts charged, and they may bring the offense charged within an existing statute, although the same is not mentioned, and the indictment is brought under another statute." Citing:

Williams v. U. S. 168 U. S. 382, 18 Sup. Ct. 92, 42 L. Ed. 509;
U. S. v. Nixon, 235 U. S. 231, 35 Sup. Ct. 49, 59 L. Ed. 207;
Wechsler v. U. S. 158 Fed. 579, 86 CCA 37;
U. S. v. Sandefuhr (DC) 145 Fed. 49;
U. S. v. Wood (DC) 168 Fed. 438;
Ex parte King (DC) 200 Fed. 622;
Commonwealth v. Peto, 136 Mass. 155.

Now does the information in this case fail to state a crime? The information (page 15 Transcript) is in the following words:

(Caption and Title)

"Complaint for Violation of the Alaska Bone

Dry Act—Pub. No. 308. Harry Mabry is accused by H. D. Stabler in this complaint of the crime of possessing intoxicating liquor, committed as follows, to-wit: The said Harry Mabry in the District of Alaska, and within the jurisdiction of this court, did wilfully and unlawfully, on the 1st day of December, 1921, at Sitka, Alaska, and in S. S. Thornton's residence near the Russian Greek Church at Sitka, Alaska, then and there have in his possession intoxicating liquor, to-wit, moonshine whisky, contrary to the form of the statute in such cases made and provided, and against the peace and dignity of the United States of America.

(Signed) H. D. STABLER,
Asst. U. S. Attorney.

United States of America,
Territory of Alaska, ss.

I, H. D. Stabler, being first duly sworn, depose and say that the foregoing complaint is true.

H. D. STABLER.

Subscribed and sworn to before me this 9th day of January, 1922.

R. W. DEARMOND,
Ex-officio Justice of the Peace."

Appellant sets up for the first time in this habeas corpus proceeding that the complaint does not state facts sufficient to constitute a

crime. He alleges that the government did not negative the exceptions in the Act. That proposition may be answered in three ways:

First. One cannot lawfully possess "moonshine whisky" in the Territory of Alaska, there being no exception in the Act to such illicit whisky.

"It is not necessary to negative any exception or proviso which, if established, would not excuse or protect defendant in respect to the particular offense with which he is charged." 23 Cyc. 238-21.

The only exceptions defined by the Alaska Bone Dry Act are pure alcohol and wine for sacramental purposes under certain regulations. This information does not charge appellant with the possession of pure alcohol or wine; these being the only two exceptions known to the Act, the information does not fail to state a crime through failure to negative these exceptions.

Second. It is not necessary to negative the exceptions in an information for illegal possession of intoxicating liquor under the wording of the Alaska Bone Dry Act.

The exceptions are contained in sections 2 to 12 inclusive and provide for legal possession of pure alcohol and wine for certain purposes under certain regulations. According to the very wording of the enacting section of the Act, to-wit,

section 1, it is necessary to refer to these other sections to determine what, if any, exceptions there are to the crimes defined in said section 1.

It is not necessary to negative exceptions such as legality of manufacture, possession, or transportation, such matters, if they exist, may be proved in defense under a plea of not guilty.

In the case of *United States v. Nelson,* 29 Fed. 202, 209, decided in the District Court, D. Alaska, 1886, objection was made that the indictment was defective in that it did not negative the exceptions in the statute. The statute read as follows:

"The importation, manufacture, and sale of intoxicating liquor in said district, EXCEPT FOR MEDICINAL, MECHANICAL, AND SCIENTIFIC PURPOSES, is hereby prohibited."

Judge Dawson said:

"When the enacting clause of a statute describes the offense with certain exceptions, it is necessary to state all the circumstances that constitute the offense, and to negative the exceptions; but, if the exceptions are contained in seperate clauses of the statute, they may be omitted in the indictment, and the defendant must show that his case comes within them to avail himself of their benefit. *Kline v. State,* 44 Miss. 318. Where provisos or exceptions are contained in distinct and independent clauses of the

statute upon which an indictment is founded, it is unnecessary to allege in the indictment that the party indicted is not within the exceptions. *State v. Cassady,* 52 N. H. 500. The allegation in the indictment is that the defendant did sell certain distilled liquors, therein described, contrary to the statutes of the United States. Now, before there could be legal sale of liquors, the law requires that the party selling must have procured a license from the governor of the territory, issued upon evidence satisfactory to that officer that the sale of such liquor would be strictly in accordance with the requirement of the statute, as provided for and required in the President's regulations. Prof. Wharton says, (Crim. Ev. section 342) "When the non-existence of the license is not averred in the indictment, and when the license is particularly within the knowledge of the party holding it, the burden is on him to produce such license in all cases in which the existence of the license is in question." If this defendant has complied with the law, and procured a license from the governor, surely he knows it; and I am clearly of opinion that this is one of that class of cases in which the burden is shifted on the defendant, and, upon the general allegation that he sold contrary to the statute, he must show that he is within the exceptions of the statute."

The above case was appealed to the Circuit

Court D. Oregon and the indictment upheld in the case of *Nelson v. U. S.*, 30 Fed. 112. Deady, J, speaking for the court at page 116 says:

"There are cases which decide that an exception like this should be negatived in the indictment. But in my judgment they are more distinguished for verbal dialetics, than good sense, and are better calculated to puzzle and pervert than to promote the administration of justice. As a rule, an exception in a statute by which certain particulars are withdrawn from or excepted out of the operation of the enacting clause thereof, defining a crime concerning a class or species, constitutes no part of the definition of such crime, whether placed close to or remote from such enacting clause. And, whenever a person accused of the commission of such a crime claims to be within such exception, it is more logical and convenient that he should aver and prove the fact than that the prosecutor should anticipate such defense, and deny it. * * * In my judgment the indictment is sufficient in this particular. The purpose of the statute is to prohibit the sale of intoxicating liquors in the district of Alaska generally, and the exception in favor of sales for particular purposes need not be noticed in an indictment for its violation."

In the case of *Shelp v. U. S.* (CCA Ninth Circuit, from Alaska) 81 Fed. 696, Hawley, District

Judge, speaking of an indictment which did not negative the exceptions in a statute reading:

"* * * the importation, manufacture, and sale, of intoxicating liquors in said district, EXCEPT FOR MEDICINAL, MECHANICAL, AND SCIENTIFIC PURPOSES IS HEREBY PROHIBITED * * *"

says:

"In *U. S. v. Nelson,* 29 Fed. 202, 209, and in the same case on writ of error to the circuit court of Oregon, 30 Fed. 112, 115, a similar indictment, which did not negative the exceptions in the statute, was held to be sufficient.

"The exception stated in the statute does not either define or qualify the offense created by the statute. The offense designated in the statute is the sale of intoxicating liquors in Alaska. This can be properly stated without any reference to the exception. There is nothing in the exception that enters into the offense condemned by the statute. The exception is purely a matter of defense, which, if relied upon, could readily have been proven by the defendants. A careful examination of the authorities will show that it is only necessary in an indictment for a statutory offense to negative an exception to the statute when that exception is such as to render the negative of it an essential part of the definition or description of the offense charged. It is the nature of the exception, and not its

locality, that determines the question whether it should be stated in the indictment or not."

State v. Ah Chew, 16 Nev. 50, 54, and authorities there cited;
U. S. v. Cook, 36 Fed. 896;
U. S. v. Cook, 17 Wall. 168, 173;
State v. Van Vliet (Iowa) 61 N. W. 241;
Bell v. State (Ala.) 15 Sou. 557.

"The court did not err in refusing the motion in arrest of judgment."

In the case of *Davis v. U. S.* 274 Fed. 928, Gilbert, C. J. speaking for the Court said:

"It is contended that it (indictment) is fatally defective in that it fails to allege that the liquor, the transportation of which was the object of the conspiracy, was not to be used for non-beverage purposes, under the provisions of section 3 of title 2 of the Act. The plaintiff's in error cite authorities to the proposition that where a statute in defining an offense "contains an exception or proviso in its enacting clause which is so incorporated with the language describing and defining the offense, that the ingredients of the offense cannot be accurately and clearly described if the exception is omitted, it must be shown that the accused it not within the exception," citing 14 R. C. L. 186. But the text writer so quoted goes on to say: "On the other hand, if the language of the section defining the offense

is so entirely separable from the exception that the ingredients constituting the offense may be accurately and clearly defined without any reference to the exception, the pleader may safely omit any such reference as the matter contained in the exception is matter of defense and must be shown by the accused."

"We think the present case comes clearly within the rule last quoted * * * The case clearly comes within the rule of this court's decisions in *Shelp v. U. S.,* 81 Fed. 694, 26 CCA 570; and *Hockett v. U. S.* (CCA) 265 Fed. 588."

The above case is followed by this court in the case of Massey *v. United States,* 281 Fed. 295.

In a recent decision of the United States Supreme Court, entitled *McKelvey et al. v. United States,* 43 Sup. Ct. 132, Mr. Justice Van Devanter said:

"One ground of objection is that the indictment contains no showing that the accused were not within the exception made in the proviso to section 3. This is not a valid ground. By repeated decisions it has come to be a settled rule in this jurisdiction that an indictment or other pleading founded on a general provision defining the elements of an offense, or of a right conferred, need not negative the matter of an exception made by a proviso or other distinct clause, whether in the same section or elsewhere,

and that it is incumbent on one who relies on such an exception to set it up and establish it. *Schlemmer v. Buffalo, Rochester & Pittsburg Ry Co.,* 205 U. S. 1, 10, 27 Sup. Ct. 407, 51. L. Ed. 681; *Javierre v. Central Altagracia,* 217 U. S. 502, 508, 30 Sup. Ct. 598, 54 L. Ed. 859, and cases cited."

Other authorities in point are:

Hockett v. U. S. 265 Fed. 588;
22 Cyc 344-D;
23 Cyc 237 (IV).

Third. Appellant did not raise objection for failure to negative any exception in the trial court and he cannot raise the question on appeal. *Ames v. Farrelly,* 121 Fed. 820.

Appellee maintains that the pleading did not fail to state a crime as alleged in appellant's brief.

There is one other pertinent feature to this case which might be properly noticed here. That is: our statute, section 2558, Compiled Laws of Alaska, providing for appeals from Justice's Courts in criminal actions provides:

"That from the filing of the transcript with the clerk of the district court the appeal is perfected, and the action is to be deemed pending therein and for trial upon the issue tried in the

justice's court. THE APPELLATE COURT HAS THE SAME AUTHORITY TO ALLOW AN AMENDMENT OF THE PLEADINGS ON AN APPEAL IN A CRIMINAL ACTION THAT IT HAS ON AN APPEAL IN A CIVIL ACTION."

Upon appeal the government could have corrected all these alleged defects. By this habeas corpus proceeding, if these questions can be raised, the government would be prejudiced by being deprived of an opportunity to amend the complaint in these particulars. If permitted to do so a defendant could by bringing habeas corpus proceedings, instead of appeal, avoid altogether the effect of section 2558. This, we maintain, is not permissible.

THE JURY VERDICT IN THIS CASE WAS VALID. Appellant further contends that the verdict of the jury was not sufficient in that it failed to state that the defendant was guilty as charged in the complaint or information, but stated only that the jury found appellant guilty. The verdict recites the court and cause and is sufficient in that respect. The Supreme Court of the United States in the case of *Statler v. U. S.*, 157 U. S. 277, uses the following language:

"It is settled, beyond question, that a verdict of guilty, without specifying any offense, is general and is sufficient and is to be understood as referring to the offense charged in the indict-

ment." Citing *St. Clair v. U. S.,* 154 U. S. 154. *Bond v. The People,* 39 Ill. 26; *State v. Jurche,* 17 La. Ann. 71; *State v. Curtis,* 6 Ired. (Law) 247; *State v. Fuller,* 34 Conn. 280; *State v. Morris,* 104 N. C. 837.

Bishop's New Criminal Procedure, page 869, section 1005a, is substantially to the same effect, the words being:

"A finding of lay people need not be framed under the strict rules of pleading or after any technical form. Any words which convey the idea to the common understanding will be adequate, and all fair indictments will be made to support it. If the jury mean to convict the defendant of everything alleged, any expression of the idea, however brief, will be adequate. The full and orderly phrase is "guilty in manner and form as charged against him in the indictment" and it is practically to be chosen. But the single word "guilty" set in a proper connection, will suffice as conveying the whole idea."

The authors of *Habeas Corpus,* 29 CJ 48, section 40 says:

"Irregularity, error, or insufficiency of the verdict will not support a writ of habeas corpus."

Appellee maintains that the verdict in this case was sufficient.

THE JUDGMENT WAS VALID AND SUFFICIENT. The further assertion is made by appellant that the judgment is void because not in compliance with section 2539, Compiled Laws of Alaska. This section provides that when a judgment of conviction is given upon a plea of guilty or upon a trial, the justice must enter the same in the justice docket substantially as follows:

"Justice's Court for the Precinct of ....., District of Alaska, Division No. .....
"The United States of America v. A. B. (Day of month and year.)

"The above-named A. B. having been brought before me, C. D., a Commissioner and ex-officio justice of the peace, in a criminal action, for the crime of (briefly designate the crime), and the said A. B. having thereupon pleaded 'not guilty' (or as the case may be), and been duly tried by me (or by a jury, as the case may be), and upon such trial duly convicted, I have adjudged that he be imprisoned in the county jail ..... days and that he pay the cost of the action, taxed at .....dollars (or that he pay a fine of ..... dollars and such costs and be imprisoned in such jail until such fine and costs be paid, not exceeding .....days, as the case may be).

C. D.,
"Comissioner and exofficio Justice of the Peace."

This form was substantially followed by the justice in the judgment under consideration in all particulars except that, in designating the crime of which the defendant was convicted, it recites that the crime was a violation of the Alaska Bone Dry Act. Appellant contends that this does not designate any crime; that there may be several crimes charged under this Act and that the word "Alaska Bone Dry Law" in themselves, are meaningless as designating the crime, and that, therefore, the judgment of the justice is void as not being in compliance with the statute aforesaid.

It will be noted that the provisions of section 2539 refer to the entry in the justice's docket by the justice after the judgment is pronounced and refers merely to the ministerial act of the entry in the docket. Section 2535 of the Compiled Laws of Alaska provides that when the defendant pleads guilty or is convicted, either by the justice or the jury, the justice must give judgment thereon for such punishment as may be described by law for the crime. This judgment may be given orally and usually is. Section 2539 provides that when a judgment of conviction is given, the entry must be made substantially in the form prescribed.

Conceding, under this view of the Act, that the entry of the judgment by the justice did not substantially comply with the form prescribed,

would it render the judgment void? To this we should look to the whole record and from it we find that the defendant was convicted of a violation of section 1 of the Act referred to, in that he had in his possession, on December 1, 1921, intoxicating liquor, to wit, moonshine whisky, and sentence was made as prescribed by law.

But appellant contends that we can only look to the judgment as spread on the docket of the justice's court, and that no presumption can be had as to the justice's proceedings, a justice court not being a court of record. In this connection we now cite with approval, and indorse the written opinion of Hon. Thos. M. Reed, District Judge, heretofore given in said District Court in this cause, on this point, found at pages 78 to 88 inclusive in the printed Transcript.

In further support of the conclusion reached by the District Judge in his opinion, attention is respectfully invited to the fallowing additional authorities:

The authors of HABEAS CORPUS, 29 *CJ* 51, *section* 46, *say*:

"Judgments or orders which are merely erroneous or irregular are valid until reversed or set aside in a direct proceeding for that purpose, and are not subject to collateral attack. Habeas Corpus is a collateral attack on the judgment under which the prisoner is held. Accordingly,

where the trial court had jurisdiction of the offense and of the person of defendant, and power to render the particular judgment or sentence in proper cases, habeas corpus will not lie upon the ground of mere errors and irregularities in the judgment or sentence rendering it not void but only voidable. But radical defects sufficient to render the judgment or sentence void on collateral attack, and only such defects, will sustain a writ of habeas corpus for the release of one held thereunder, subject to the rules elsewhere stated as to discretion in the issuance of the writ, and the existence of other remedies by way of trial, appeal, or otherwise."

We maintain that in this case appellant's proper remedy was appeal. As we have heretofore seen denial of the appeal, even though improper, is no ground for habeas corpus. Further, appellant could have prosecuted his appeal or error to the Circuit Court from the judgment of the District Court dismissing his pretended appeal and rendering judgment as theretofore rendered in the Justice's court. These remedies, available to appellant, he wholly failed and neglected to pursue. Instead he attacks the judgment and proceedings by habeas corpus. If it can be held that appellant is entitled to prosecute habeas corpus proceedings in this case, we are not herein concerned as to whether this judgment is voidable. Is the justice's judgment, as affirmed by the District Court, void?

Appellant maintains that the judgment is void for the reason that it does not sufficiently charge the crime of which he was convicted and sentenced.

Bailey on HABEAS CORPUS, volume I, page 84, *says*:

"A judgment is not void ON THE GROUND OF NOT STATING THE OFFENSE OF WHICH THE PRISONER WAS CONVICTED, if it shows he was indicted for some offense and tried and convicted, and that the sentence passed upon him was one which the court had jurisdiction to pronounce for some offense of which he might have been convicted under the indictment * * * The reason for the rule stated lies in the fact that a habeas corpus proceeding is a collatteral attack of a civil nature to impeach the validity of a judgment or sentence of another court in a criminal proceeding and it should therefore be limited to case s in which the judgment or sentence attacked is clearly void by reason of its having been rendered without jurisdiction or by reason of the court having exceeded its jurisdiction in the premises."

See also *Ex parte Thurston,* 233. Fed. 874; *Ex parte Gibson,* 31 Cal. 619, 91 Am. Dec. 546.

And the authors of *HABEAS CORPUS,* 12, R.C. L. 1207, section 26 say:

"The majority of the decisions, and especially those more in consonance with reason and justice, are averse to the discharge of criminals who have been duly convicted when the application for their release is by petition for habeas corpus based on some error, omission, or mistake in the judgment or sentence which might have been cured or corrected by writ of error or appeal. Thus it has been held that A COURT WILL NOT REVIEW IN HABEAS CORPUS PROCEEDINGS THE FAILURE OF A JUDGMENT TO STATE THE PARTICULAR OFFENSE OF WHICH THE DEFENDANT IS CONVICTED."

The Court of Appeals, First District, California, in the case of *Ex parte Morgensen,* 90 Pac. 1063, say:

"The validity of the judgment is also challenged. It is asserted that it fails to state the offense of which the petitioner was convicted. The judgment recites that the petitioner was duly convicted of the crime of violating Ordinance No. 130 of the town of Los Gatos, entitled, "An ordinance relative to the alcoholic liquor traffic in said town of Los Gatos, committed as charged in the complaint as aforesaid, that defendant Morgensen pay a fine of $300 * * * This judgment contains a sufficient designation of the offense charged. *Ex parte Patrick Murray,* 43 Cal. 455. Petitioner remanded."

And the notes of *Koepke v. Hill,* 87 Am. State Rep. page 190, the authors say:

"A mere irregularity or informality in a judgment or sentence of conviction cannot be assailed on habeas corpus. Thus, a judgment of conviction not stating the particular offense of which the defendant is convicted (*Ex parte Gibson,* 31 Cal. 619, 91 Am. Dec. 546; *People v. Cavanagh,* 2 Parc C. Rep. 660) * * * is not subject to a collateral attack on habeas corpus."

In *Ex parte Gibson,* 31, Cal. 619, 91 Am. Dec 546, Sanderson, J, speaking for the Supreme Court of California, says at page 552:

"The only reason why, as I conceive, the judgment should show the offense is, that it may appear that the punishment inflicted is lawful, or in other words, that the court had not exceeded its power in that respect * * * The judgment in this case may be erroneous in not stating more definitely the offense of which the prisoner was convicted, but I am satisfied that it is not void." Prisoner remanded.

And speaking of judgments of inferior courts, the Supreme Court of Alabama, in the case of *Ex parte Adams,* 170, Ala. 105, 54 S. 501, holds:

"The courts will go to all reasonable lengths to support the judgments of inferior courts not of record which do not conform to prescribed

forms when assailed on habeas corpus." 29 CJ. 53, note 27 (A) *Church Hab. Corp.* section 296.

The authors of *HABEAS CORPUS,* 12 Ruling Case Law at page 1192 say:

"Proceedings on habeas corpus to obtain release from custody under final judgment being in the nature of a collateral attack, the writ deals only with such radical defects as render the proceeding or judgment absolutely void, and cannot have the effect of an appeal, writ of error, or certiorari, for the purpose of reviewing mere error and irregularities in the proceedings leading up to the final judgment or sentence of a court of competent jurisdiction by virtue of which the prisoner is committed nor are mere defects in the judgment or sentence itself, or irregularities after it is pronounced, reviewable in this manner. If the court has jurisdiction of the person and the subject matter, and could render a judgment upon a showing of any sufficient state of facts, any judgment which it may render, however erroneous, irregular, or unsupported by evidence, will be sustained as against an attack by habeas corpus. THIS RULE APPLIES TO INFERIOR COURTS, AND THE JUDGMENT OF AN INFERIOR COURT, SUCH AS A POLICE COURT, MAYORS, MAGISTRATES, OR JUSTICES, HAVING JURISDICTION CONFERRED BY LAW TO TRY AND DISPOSE OF A CRIM-

INAL CASE, IS AS CONCLUSIVE AND RESTS UPON THE SAME BASIS, WHEN THE JURISDICTION HAS ATTACHED, AS THE ADJUDICATION OF ANY OTHER COMMON LAW COURT."

Appellee maintains that the judgment in this particular is at most irregular, and is not void, and in a collateral attack on habeas corpus must be held sufficient.

THE JUDGMENT IS NOT VOID BECAUSE IT SENTENCES APPELLANT TO IMPRISONMENT FOR COSTS.

Appellant can not seriously contend that the whole judgment is void because it requires him to be imprisoned in jail until 'such fine and costs be paid, not exceeding 300 days," because at page 56 of his printed Brief he says:

"So much of the justice's judgment against defendant as requires him to be imprisoned in jail, or "in jail at Sitka," or "in jail at Juneau, until such fine and costs be paid," is void."

His contention is that only part of the judgment is void. That also may be answered in two ways: First, the judgment does not provide imprisonment for costs; and second, even if it did that would not render the judgment void.

THE JUDGMENT DOES NOT PROVIDE IM-

PRISONMENT FOR COSTS. The judgment in this particular is in the exact words of the form of judgment provided by the Compiled Laws of Alaska for justice's courts. On the face of the judgment the justice did not exceed his jurisdiction imposing such sentence. Section 2299 of the Compiled Laws of Alaska provides:

"That a judgment that the defendant pay a fine must also direct that he be imprisoned in the county jail until the fine be satisfied, specifying the extent of the imprisonment, which can not exceed one day for every two dollars of the fine; and in case the entry of judgment should omit to direct the imprisonment and the extent thereof, the judgment to pay the fine shall operate to authorize and require the imprisonment of the defendant until the fine is satisfied at the rate above mentioned."

The Justice's judgment (page 21 Transcript) reads:

" * * * I have adjudged that he be imprisoned in the jail at Sitka for four months and that he pay the costs of the action taxed at Ninety Three and 55-100 dollars, and that he pay a fine of Six Hundred Dollars, and be imprisoned in such jail until such fine and costs be paid, NOT EXCEEDING THREE HUNDRED DAYS."

The words "and costs" in the above judgment providing for imprisonment until such fine

"and costs" be paid, are surplusage and may be rejected. The authors of CRIMINAL LAW, 16 CJ 1313, section 3095 on this point say:

"Words or phrases in the judgment which do not add to or change the mode of the punishment do not invalidate the sentence, but may be rejected as surplusage."

The imprisonment for fine and costs in this case is limited to three hundred days, which, at $2.00 per day would clearly cover the fine only. There is no intention on the part of the justice in rendering this judgment to imprison appellant for costs. If it had been such intention the number of days imprisonment would not have been limited to three hundred, but would have been enough days in addition to three hundred to cover the $93.55 costs, or forty six days in addition to three hundred days. Therefore, the sentence must be construed to read: "and be imprisoned in such jail until such fine be paid, not exceeding three hundred days." The words "and costs" are clearly surplusage. A judgment in a criminal case must be construed in its entirety. 16 CJ 1313, section 3094.

EVEN IF THE JUDGMENT DID PROVIDE IMPRISONMENT FOR COSTS THE JUDGMENT WOULD NOT BE VOID ON THAT ACCOUNT.

The authors of *HABEAS CORPUS* 12 R. C. L. 1208, section 27, say:

"Excessive or deficient sentence does not warrant relief by habeas corpus. The sentence is not void and may be corrected to that which the court has jurisdiction to pass * * * With regard to the effect of excessive sentences as entitling the prisoner to relief on habeas corpus the principle is well established by the great weight of authority that, where a court has jurisdiction of the person and of the offense, the imposition of a sentence in excess of what the law permits does not render the legal or authorized portion of the sentence void, but leaves only such portion of the sentence as may be in excess open to question and attack. In other words, the sentence is legal so far as it is within the provisions of law and the jurisdiction of the court over the person and offense, and only void as to the excess when such excess is separate and may be dealt with without disturbing the valid portion of the sentence. Prior to the expiration of that part of the sentence that the court could legally impose, the prisoner will not, according to the prevailing rule, be discharged on habeas corpus, on the ground that the sentence is excessive."

The authors of *HABEAS CORPUS* 29 CJ 58, section 50, lays down the rule as to excessive sentence, as follows:

"It has been held broadly that a sentence imposing imprisonment for a longer term, or greater punishment, than authorized by law is

merely erroneous, but not void, and therefore not ground for relief by habeas corpus, but some of these cases can be supported without going so far, upon the ground that the application was premature, being made before the legal part of such sentence had been served or satisfied." There is also authority to the contrary. "But the present weight of authority supports the view that an excessive sentence is valid as to so much of as it is authorized by law and void only as to the excess, provided the sentence is severable so that the lawful part may be performed without performing the unlawful part * * * In accordance with this view habeas corpus will not lie to discharge a prisoner held under an excessive sentence before he has served or satisfied the authorized part of it, or the sentence on the valid and distinct judgment, but after the authorized part has been served or satisfied, further detention is illegal, and relief may be had by habeas corpus."

The case of *Wallace v. White,* 115 Me. 513, 99 A 452 holds:

"Imposition of costs, if in excess of jurisdiction, is severable and not ground for discharge before satisfaction of the valid part of the sentence."

And in the Alaskan case of *Booth v. U. S.* 197 Fed. 286, appealed to this court, the court says:

"The judgment, therefore, will be so modified as to strike therefrom that portion thereof which provides for imprisonment of the plaintiff in error until the costs be satisfied." "In other respects the judgment is affirmed."

See also *Jackson v. U. S.* 102 Fed 473, 42 CCA 452.

It clearly appears that appellant's objection on this point is not well taken. At most, that part of the sentence providing for imprisonment for costs is void, the remaning part of the sentence is valid. Furthermore this action would be premature now and would not lie until such time as appellant was actually imprisoned for costs.

There are only two other points in appellant's Brief which ought to be noticed before conclusion.

(1) Appellant's eleventh (11) assignment of error, at page 9 in his Brief reads as follows:

"That the order of said district court so made on March 16th, 1922, directing the issuance of a bench warrant for the arrest and imprisonment of this appellant was in excess of the jurisdiction of the said district court and its judge, and null and void, and the arrest and imprisonment of this appellant being made and done under that warrant, was so done without jurisdiction and is null and void."

Appellant also refers to a bench warrant in his twelfth (12) assignment of error at the same page in his Brief (p. 9 Brief).

This bench warrant is not printed in the transcript, although a part of the record in the case. It is the contention of the appellee United States Marshal that this appellant voluntarily delivered himself up into custody according to the terms of his bail bond, in execution of the Justice's judgment as affirmed by the District Court. (See testimony pp 52-56 Transcript). He was not taken into custody on a bench warrant as referred to by appellant in his assignment of errors, for the reason that the said bench warrant was never delivered to said United States Marshal, but was returned by the United States Attorney to the Clerk of the District Court unserved and unexecuted for the reason that appellant had delivered himself up into custody under the circumstances set forth at pages 52 to 56 of the Transcript. Any reference made to appellant's arrest under this bench warrant is not based on fact.

(2) The Alaska Bone Dry Act was not repealed by the National Prohibition Act. *Abbatte v. U. S.* 270 Fed. 735; *Koppitz v. U. S.* 272 Fed. 99.

CONCLUSION: Counsel for appellee United States Marshal respectfully maintain that the judgment of the District Court dismissing the

Writ and remanding the appellant must be upheld.

First. Because this appellant could have had his proper relief by making a proper appeal to the District Court for the First Division from the proceedings and judgment had in the Justice's court at Sitka.

Second. Appellant should have prosecuted his Writ of Error or Appeal from the final order of the District Court dismissing his pretended appeal instead of prosecuting habeas corpus.

Third. Appellant is not illegally restrained—he has been released on bail pending appeal from an order remanding him in habeas corpus proceedings, and this appeal should be dismissed in the appellate court for that reason.

Fourth. Appellant was not entitled to prosecute habeas corpus proceedings, according to chapter 57, Compiled Laws of Alaska, because it appeared from the United States Marshal's return, which was uncontroverted, that he held appellant by virtue of the legal judgment of a competent tribunal of criminal jurisdiction, to wit, the judgment of the Justice's court for Sitka precinct, affirmed by the District Court.

Fifth. Appellant is not entitled to relief on the merits of the proceedings and judgment in said Justice's court; the imprisonment was legal and valid.

WHEREFORE, Appellee respectfully prays that said appeal be dismissed and appellant remanded to the custody of appellee to serve his sentence; that the District Court's judgment dismissing said Writ and remanding appellant be declared good and valid;

Respectfully submitted,

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